

STATE OF MICHIGAN
COURT OF APPEALS

GEORGE PLATSIIS and CHRSTINE MANOS,

Plaintiffs-Appellants,

v

CITY OF BATTLE CREEK,

Defendant-Appellee.

UNPUBLISHED

July 7, 2000

No. 210553

Calhoun Circuit Court

LC No. 96-003425 CC

Before: White, P.J., and Wilder and Meter, JJ.

PER CURIAM.

Following a bench trial, plaintiffs appeal as of right a judgment and order finding no cause of action against defendant. We affirm.

I

Plaintiffs and defendant own adjoining parcels of land in Calhoun County. Plaintiffs' parcel of approximately ninety-five acres is located at 1572 Harmonia Road in Bedford Township, just south of the railroad tracks. Plaintiffs' property, which they inherited from their father in 1971, is zoned for agricultural use and was used solely for that purpose prior to the 1960's. Farm drains were built on the land to facilitate farming activities conducted thereon years ago, however, there has been no farming on the land, and the drainage system has not been maintained, since the 1960's. The farm drains on plaintiffs' property empty into a 36" culvert under a railroad spur at the north end of their property and the drainage continues to flow into a 30" culvert beneath the main railroad tracks.

Defendant purchased its property, comprised of approximately 375 acres, from the federal government in 1971 and, upon acquiring the property, it developed Fort Custer Industrial Park on the northeast portion of the land. The industrial park abuts the northern two-thirds of plaintiffs' western property line and is located in the Battle Creek-Fort Custer Urban Renewal Plat, an area which remains largely undeveloped. At the time defendant acquired the land, a 30" storm drain outlet about 1,800 feet west of plaintiffs' property line existed on the property. As part of the development of the industrial park, defendant constructed a storm water sewer system in the northeast quadrant of its property and installed a 48" discharge pipe at the head of the already existing drain outlet. There was no detention

pond or stilling basin installed east of the 48" outlet pipe. Water discharged through the 48" pipe at the north end of defendant's land was served by a pre-existing 18" culvert that directed water into the same 30" culvert under the main railroad tracks through which plaintiffs' watercourse was directed.

In 1994, in response to complaints from plaintiffs about clogging in the culverts and flooding on their property, defendant cleaned the culverts under the railroad tracks at the north end of plaintiffs' property that were impeding water drainage from both plaintiffs' and defendant's property. Defendant also terminated the lateral discharges and extended the 48" drain beyond the northern end of plaintiffs' land and parallel to plaintiffs' western property line. This improvement was designed to eliminate any storm water flow from entering plaintiffs' land, however, plaintiffs still complained that water continued to discharge from defendant's property onto their land, increasing the water levels that existed prior to the development of the industrial park.

In 1996, plaintiffs filed a four-count complaint against defendant seeking damages for injury to their property and an injunction prohibiting defendant from discharging any further water onto their property. Following cross-motions for summary disposition, the trial court granted partial summary disposition to defendant on plaintiffs' constitutional tort and inverse condemnation claims, but denied summary disposition to both parties on plaintiffs' trespass and nuisance claims. The trial court additionally ruled that a preliminary injunction was appropriate pending the outcome of trial. Following a bench trial for which an advisory jury was employed, the trial court found no cause of action on plaintiffs' remaining claims, and entered judgment in favor of defendant. The trial court also dissolved the preliminary injunction issued against defendant prior to trial. The trial court subsequently denied plaintiffs' motion for JNOV and/or new trial.

II

Plaintiffs argue that the trial court erred in denying their motion for summary disposition because defendant failed to properly answer the complaint and did not assert its affirmative defenses in accordance with the applicable court rules. We disagree.

This Court reviews a trial court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition under MCR 2.116(C)(9) is granted where the opposing party has failed to state a valid defense to the claim asserted against him. The trial court considers only the pleadings to determine whether summary disposition is proper. MCR 2.116(G)(5).

A summary disposition motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Spiek, supra* at 337. The court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of material fact exists. *Id.*

In Michigan, the function of pleadings is to give notice of the nature of a claim or a defense so as to permit the opposing party to take appropriate steps to prepare their case. Thus, when an answer is challenged on this basis, the trial court must determine whether the answers are sufficiently specific so

that the plaintiff may adequately prepare his case. *Stanke v State Farm Mutual Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993). Moreover, the court rules liberally permit amendment of pleadings to avoid summary disposition. MCR 2.116(I)(5); MCR 2.118(A)(2).

After a thorough review of the amended complaint and answer, we find that defendant sufficiently answered the allegations in plaintiffs' complaint with the requisite specificity to inform plaintiffs of its theory of the case, that is, that plaintiffs failed to support their trespass and nuisance theories of recovery with compelling evidence and plaintiffs have not suffered any compensable damages as a result of defendant's conduct. Indeed, plaintiffs did not argue and the record does not show that plaintiffs were unable to adequately prepare their case because of defendant's answers.

Likewise, we find that defendant adequately pleaded its affirmative defenses. Plaintiffs were properly informed of defendant's challenges to the allegations in the complaint and on what facts it relied to assert each affirmative defense sufficient to allow plaintiffs to prepare their case. That defendant refused to concede certain facts, or admit liability for plaintiffs' alleged damages, does not warrant dismissal of the affirmative defenses. Defendant adequately answered plaintiffs' complaint, thereby creating a genuine issue of material fact as to the trespass and nuisance claims. Therefore, denial of plaintiffs' motion for summary disposition on those claims was appropriate.

III

Plaintiffs next argue that the trial court erred in finding that plaintiffs failed to establish that defendant committed a trespass or trespass-nuisance by a preponderance of the evidence. We disagree.

This Court reviews a trial court's factual findings in a bench trial for clear error. *Bracco v Michigan Tech University*, 231 Mich App 578, 585; 588 NW2d 467 (1998). A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*

It is well-settled that the weight to be accorded expert testimony is a matter for the trier of fact to determine. *City of Detroit v Larned Associates*, 199 Mich App 36, 41; 501 NW2d 189 (1993). Where there is conflicting testimony presented at trial regarding essential issues in the case, due regard shall be given to the trial court's superior opportunity and ability to judge the credibility of witnesses who appeared before it. MCR 2.613(C); *Sparling Plastic Industries, Inc v Sparling*, 229 Mich App 704, 714; 583 NW2d 232 (1998). This Court must defer to the trial court's credibility determinations unless the findings are clearly erroneous. *Bracco, supra* at 585.

After reviewing the record, we conclude that the trial court's factual finding that plaintiffs did not suffer any compensable damage by reason of any unlawful act of defendant was not clearly erroneous. The trial court examined at length the expert testimony presented by both parties and determined that the testimony of defendant's expert witnesses, Jeff Scholl and Jeffrey King, outweighed the evidence presented by plaintiffs. While not finding plaintiffs' experts to be untruthful or incredible, the trial court did determine that the testimony of defendant's experts was more credible because it was more

thorough, was based on actual observations of plaintiffs' land during heavy rainfalls, and utilized widely accepted methods for calculating the coefficient of water runoff. The trial court was free to accept or reject, in whole or in part, the testimony proffered by the expert witnesses. See *Larned, supra* at 42. In view of the substantial deference afforded to the fact finder's determinations of credibility of witnesses and the weight to be given to expert witness testimony, we decline to interfere with the trial court's finding of no cause of action.

We likewise reject plaintiffs' argument that the trial court abused its discretion by denying their motion for a new trial on the basis that the verdict was against the great weight of the evidence. We initially note that, at the motion for new trial, plaintiffs asked the trial court to reconsider its ruling in light of additional evidence that was not presented at trial. Plaintiffs additionally complained that due to time constraints during the trial, they did not have an adequate opportunity or ability to cross-examine certain witnesses. The trial court denied plaintiffs' motion for lack of merit. However, plaintiffs now argue for the first time that the trial court's ruling was against the great weight of the evidence, the trial court failed to understand the proofs, and the trial court ignored compelling circumstantial evidence and expert testimony supporting their position. Because plaintiff did not assert this argument before the trial court, and the trial court thus did not evaluate or decide the motion for new trial on this basis, this issue has not been preserved for appellate review. *Abel v Eli Lilly & Co*, 418 Mich 311, 322; 343 NW2d 164 (1984). In any event, for the same reasons as indicated above, namely, that the factual disputes and the credibility of the expert witnesses in this case were properly resolved by the trier of fact, we find no basis for interfering with the judgment. Defendant presented substantial and compelling evidence that no water runoff from its property entered plaintiffs' land sufficient to cause damage to the property, adequately refuting plaintiffs' circumstantial evidence to the contrary. There was ample evidence introduced at trial to support the trial court's ruling and plaintiffs' motion for new trial was properly denied.

IV

Next, plaintiffs argue that the trial court erred in dissolving the preliminary injunction against defendant at the conclusion of trial. We disagree.

The Court reviews a trial court's decision to grant or deny injunctive relief for an abuse of discretion. *Michigan State AFL-CIO v Sec'y of State*, 230 Mich App 1, 14; 583 NW2d 701 (1998). The purpose of a preliminary injunction is to maintain the status quo pending a final hearing regarding the parties' rights. *Alliance for the Mentally Ill of Michigan v Dep't of Community Health*, 231 Mich App 647, 655-656; 588 NW2d 133 (1999). On the other hand, a permanent injunction is "an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." *Kernen v Homestead Development Co*, 232 Mich App 503, 509; 591 NW2d 369 (1998); *Peninsula Sanitation, Inc v City of Manistique*, 208 Mich App 34, 43; 526 NW2d 607 (1994). In deciding whether injunctive relief is appropriate, the trial court will generally balance the benefit of an injunction to the plaintiff against the inconvenience and damage to the defendant, and decide in accordance with justice and equity under all the circumstances of the case. *Kernen, supra* at 514.

At the conclusion of the bench trial, the trial court found that because there was no water runoff entering plaintiffs' property, there was "no need for the City to be restrained." While the trial court did not foreclose the possibility of plaintiffs filing another action in the future in the event that an incident occurred causing water from defendant's property to enter plaintiffs' land, in the absence of a continuing or impending threat of physical intrusion onto plaintiffs' property, the trial court found no basis for injunctive relief at that time.

Our review of the record reveals that, other than plaintiffs' unsubstantiated claim that water runoff from defendant's land will continue to drain onto their property and further damage their land, plaintiffs have failed to present any evidence that they will continue to suffer specific, irreparable harm to their property in the future. In view of our conclusion above, that the trial court's factual findings pertaining to the merits of this case were not clearly erroneous, and in the absence of a showing of a real and imminent danger to plaintiffs' property, we find no basis for imposing a permanent injunction on defendant. Accordingly, the trial court's dissolution of the preliminary injunction, and its refusal to impose a permanent injunction, was not an abuse of discretion.

V

Finally, plaintiffs argue that the trial court erred in granting summary disposition to defendant on their constitutional tort and unjust enrichment claims. First, plaintiffs' bare assertion that the trial court erred in dismissing their constitutional tort claim, without citation to factual or legal authority in support of their argument or an explanation as to why they believed the trial court's ruling was erroneous, was not properly presented to this Court for review. A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Morris v Allstate Ins Co*, 230 Mich App 361, 370; 584 NW2d 340 (1998). Accordingly, we consider this claim abandoned and decline to review it.

Further, with respect to plaintiffs' claim that the trial court erred in refusing to allow plaintiffs to present evidence on their unjust enrichment theory of damages, in view of our decision to affirm the trial court's finding of no cause of action on liability, the issue of damages is moot. *B P & v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

Affirmed.

/s/ Helene N. White
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter